

**UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT**

**UNITED STATES OF AMERICA**

**v.**

**DALE AVERY**

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**File No. 1:02-CR-47-01**

**ORDER**

The Magistrate Judge's Report and Recommendation was filed April 4, 2005 (Paper 54). After de novo review and absent objection, the Report and Recommendation is AFFIRMED, APPROVED and ADOPTED. See 28 U.S.C. § 636(b)(1). Petitioner Avery's motion for re-sentencing, brought pursuant to 28 U.S.C. § 2255, is DENIED.

Pursuant to Fed. R. App. P. 22(b), the Court DENIES petitioner a certificate of appealability ("COA") because the petitioner failed to make a substantial showing of a denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). In addition, because the petition has been dismissed on procedural grounds, the petitioner cannot be issued a COA due to his failure to demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." See Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).

It is further certified that any appeal taken in forma pauperis from this Order would not be taken in good faith because such an appeal would be frivolous. See 28 U.S.C. § 1915(a).

SO ORDERED.

Dated at Brattleboro, in the District of Vermont, this 22<sup>nd</sup> day of April, 2005.

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/s/ J. Garvan Murtha

J. Garvan Murtha  
United States District Judge